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Supreme Court U.S.
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In The
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1846

THE STATE OF NEW HAMPSHIRE,
DEPARTMENT OF EMPLOYMENT SECURITY;
AND THE STATE OF NEW HAMPSHIRE,
Appellants

v.

THE HONORABLE E. RAY MARSHALL, SECRETARY OF LABOR
OF THE UNITED STATES; AND THE UNITED STATES
DEPARTMENT OF LABOR,
Appellees

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

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May 20, 1980

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Statutes:

The statutes listed under "Statutes Involved", infra, are cited passim.

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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

JURISDICTIONAL STATEMENT

The State of New Hampshire, and the New Hampshire Department of Employment Security, Appellants, appeal from the final judgment of the United States Court of Appeals for the First Circuit, dated February 20, 1980, holding that the New Hampshire Unemployment Compensation Law, Revised Statutes Annotated (RSA) 282,

is contrary to federal law, as expressed in the Federal Unemployment Tax Act (FUTA), 26 U.S.C. §3301-3311, and holding further that the 1976 Amendments to FUTA, imposing certain mandatory coverage requirements upon states as a condition of retaining certification under 26 U.S.C. §3304 (c), are constitutional.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, which appears in the appendix hereto, is reported at 616 F. 2d 240 (February 20, 1980).

The Order of the Secretary of Labor, dated October 30, 1978, is not reported, and is reproduced in the appendix hereto.

JURISDICTION

The proceeding below was one seeking review pursuant to 26 U.S.C. §3310 of an order of the Secretary of Labor adverse to the State and citizens of New Hampshire within the meaning of 26 U.S.C. §3304 (c), and asserting that the provisions of the federal law relied upon

by the Secretary are repugnant to the Constitution of the United States, and therefore void. The court below affirmed the Secretary's finding of repugnance of New Hampshire law to federal statutes, and held those federal statutes to be constitutional.

The date of entry of the decision below is February 20, 1980. Notice of appeal shall have been filed, contemporaneously with this Jurisdictional Statement, in the Court of Appeals for the First Circuit. This Statement is being docketed within ninety days from the date of decision below. Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (2).

Appellants believe that there are no cases bearing directly upon the matter of this Court's jurisdiction on appeal in such a case, as this is believed to be the first instance of review by a Court of Appeals of an Order of the Secretary of Labor pursuant to 26 U.S.C. §3310. Cf. Opinion below, n.1.

STATUTES INVOLVED

The statutes involved are of sufficient number and length to preclude verbatim recitation here; accordingly they are cited below, and reproduced at length in the Appendix hereto.

UNITED STATES CONSTITUTION

Amendment V: No person shall...be deprived of life, liberty, or property without due process of law;...

Amendment X: The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

FEDERAL STATUTES

The following provisions of federal law are involved in the issues raised by this appeal:

26 U.S.C. §3301
26 U.S.C §3302
26 U.S.C. §3304
26 U.S.C. §3306
26 U.S.C. §3309
26 U.S.C. §3310

Of the provisions so involved, the constitutional challenge by Appellants herein focuses upon §3304 (a) (b) (A), by the operation of which the unconstitutional result is reached. Also challenged is the operation of §3302 (a) (1) in a geographically non-uniform manner upon the occasion of an action by the Secretary under §3304 (c).

STATE STATUTES

This appeal involves, in the broadest sense, the entire New Hampshire Unemployment Compensation Law, Revised Statutes Annotated (RSA) 282. The portions of that law specifically involved in this matter are the following:

RSA 282:1-H (4) (g)
RSA 282:1-H (4) (q)
RSA 282:1-H (4) (r)
RSA 282:1-H (4) (s)
RSA 282:1-N (1) (a)
RSA 282:1-O

QUESTIONS PRESENTED

This appeal presents, in its broadest perspective, the question whether the provisions of the Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 State. 2667 (as amended by Pub. L. No. 95-19, 91 Stat. 39) (the "1976 Amendments") and the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 695 (the "1970 Amendments") [1/] to the Federal Unemployment Tax Act, 26 U.S.C. §3301 et seq. ("FUTA"), which require the State of New Hampshire and its local governments to finance unemployment compensation coverage for their own employees, unconstitutional and unenforceable by the Secretary of Labor ("the Secretary") against the New Hampshire Department of Employment Security (NHDES) and the State of New Hampshire.

1/ New Hampshire is in conformance with the 1970 Amendments. The constitutional predicate of these Amendments is the same as that of the 1976 Amendments.

The subsidiary issues raised in turn by that question are discussed herein under "the Questions Are Substantial", infra.

Inherent, as well, in this appeal is the question whether the process, both administrative and judicial, by which the principal issues are raised, litigated, and reviewed is consistent with accepted standards of due process of law.

STATEMENT OF THE CASE

The New Hampshire Department of Employment Security et al. ("NHDES") has petitioned (Petition filed December 28, 1978) this Court for judicial review pursuant to 26 U.S.C. §3310 of the Order of the Secretary, dated October 30, 1978, which concludes that New Hampshire's Unemployment Compensation Law ("NHUCL") failed to conform to certain requirements of the Federal Unemployment Tax Act, as amended, 26 U.S.C. §3301 et seq. ("FUTA"), principally those requiring State taxation of all local governments (and State agencies) in order to finance a

Federally required public sector program of unemployment benefits.

The challenged provisions employ sanctions for enforcement, not against these governments as employers, but against private sector employers in New Hampshire. The Congress was candid in admitting that it was setting requirements on State and local governments which were immune - of constitutional necessity - from the sanctions under the Federal tax power, U.S. Const. Art. I §8 cl. 1. Because of serious constitutional objections to the power of Congress thus to dictate the terms and conditions of State and local

government employment, New Hampshire has refused to conform to the coercive Federal mandate of the 1976 Amendments. 2/ The Supreme Court of the United States has held in National League of Cities v. Usery, 426 U.S. 833 (1976) the Federal government has no such power under the Constitution's Commerce Clause, and Respondents' reliance upon the tax power as a constitutional basis for the Amendments here challenged is rejected by National League, as that case is founded upon tax immunity decisions of the Supreme Court of the United States. New

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2/ In County of Los Angeles, California, et al. v. Marshall, et al. Civ. No. 77-2023 (D.D.C.), dismissed Mar. 7, 1978, appeal docketed Nos. 77-2138, 78-1232, etc. (D.C. Cir. Mar. 8, 1978, 7 States, including New Hampshire, and some 1750 local governments have sought to challenge the constitutionality of these same Federal requirements. But USDOL successfully argued there that the instant proceeding is the only appropriate means to secure judicial attention to these constitutional claims. The D.C. Circuit affirmed, March____, 1980, 416 F.2d.____.

Hampshire's refusal to submit to the unconstitutional requirement thus triggered the sanction, also unconstitutional, on its innocent private sector employers.

A. JURISDICTION OF THIS COURT, AND THE PROCEEDINGS BELOW

Pursuant to a Notice of Hearing issued by the Secretary on June 15, 1978 (43 Fed. Reg. 27500), a conformity hearing ("Conformity Proceeding") was held before an Administrative Law Judge of the Department of Labor on September 14-15, 1978, in Washington, D.C., 3/ on six numbered issues of the conformity of NHUCL with various Federal requirements of FUTA. 4/

3/ The parties below were: The State of New Hampshire, Department of Employment Security and the United States Department of Labor. Others participated as interested parties.

4/ Petitioners attempted unsuccessfully there to obtain a reviewable conclusion on the constitutionality vel non of the 1976 Amendments.

The Administrative Law Judge rendered his Recommended Decision on October 13, 1978, and in accordance with the Revised Rules of Procedure made both findings of fact and conclusions of Law on the six statutory issues. The Administrative Law Judge made only findings of fact on the constitutional law issues. The Recommended Decision of the Administrative Law Judge to the Secretary of Labor found the NHUCL not in conformance with Federal requirements of FUTA on each of the six issues specified in the Notice of Hearing.

On October 30, 1978, the Secretary issued his final Order, adopting verbatim as his own every modification to the Recommended Decision proposed by USDOL attorneys in their Statement of Exceptions.

The effect of the Order here on review is to impose on private employers in New Hampshire a $40 million penalty per year for the refusal of the State to tax, not them, but the local

governments of New Hampshire.

B. FUTA AND THE FEDERAL-STATE UNEMPLOYMENT COMPENSATION PROGRAM

1. Symmetrical Private Sector Program

The basic structure of the private sector Federal-State Unemployment Compensation Program has remained unchanged from the enactment of the Social Security Act, c. 271, 49 Stat. 620, in 1935. Title IX of that Act imposed on private sector employers a Federal payroll tax of 3.0% (on the first $3000 of each employee's salary), but allowed a credit of up to 90% of this amount (2.7%) for contributions paid by such employers into a State unemployment compensation fund under a State unemployment compensation law which met various conditions for Federal approval set out in Title IX. The reality is that the full FUTA tax (3.0% originally, now 3.4% of the first $6000 of salary) never has been imposed. In operation, the tax is 0.7% (originally 0.3%), with the 2.7% credit acting - by the threat of its withdrawal - as a

sanction to insure that State laws conform to changing Federal requirements. In addition, Federally approved state programs were eligible for Federal grants to the States to pay the costs of administering their unemployment compensation programs.

New Hampshire's private sector unemployment compensation program has since the original Federal Act, been enacted and amended to conform to changing Federal standards. 5/ New Hampshire's

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5/ The 1976 Federal Amendments, Pub. L. No. 94-566, required several technical amendments in the private sector program; the principal requirement, however, was the public sector program. New Hampshire, as do all the States, routinely amends its law to conform to the entirety of new requiremnets of a particular Federal Amendment for the private sector program.

Therefore, New Hampshire, in refusing on constitutional grounds to impose the tax on its political subdivisions to finance a public sector program as required by Pub. L. No. 94-566, also failed to make the several technical private sector amendments. There is no hint in the New Hampshire legislative history - nor has US DOL suggested any below - of an unwillingness in New Hampshire to make these technical amendments.

private sector program is not in issue in this case, [6/] except insofar as private employers are held hostage to coerce adoption of the Federally mandated public sector program.

2. Asymmetrical Addition of Federally Required Public Sector Program

The change of the Federal Amendments whose constitutionality is the subject of this case was to break the symmetry of the 1935 Act's private sector program.

Originally, each (private sector) employer subject to the Federal requirement of State taxation was also subject to the Federal FUTA

6/ Nor does this case involve a challenge to perfectly rational conditions under 42 U.S.C. §503 placed on Federal administration grants to the States, principally for the administration of the private sector program.

tax. 7/ His was a sum certain in Federal and State taxes (3.0%): what was not paid to the State (under Federally approved laws) would be paid to the Federal government. In the private sector program, the private employer was not a hostage to insure State-law conformance to Federal requirements, and the State was not coerced into taking for its own administration 90% of the sum (3.0%) which would otherwise be given over entirely to Federal administration.

7/ For the first 37 years of the Federal-State program, no provision of the Federal statutes required the State laws to cover any specific class of employees in either the public or private sector. Instead, the imposition of the FUTA tax and allowance of offsetting credit induced State law coverage in the private sector which was generally as broad as that of the Federal tax, although the States retained the authority to adopt more restrictive coverage or expand coverage beyond the inducement provided by the Federal law.

Originally, State and local governments were subject neither to the Federal FUTA tax nor to the Federal requirements of a State tax. State legislatures were thus entirely free to experiment with varying degrees and terms of unemployment insurance coverage for employees of State and local governments. State legislatures could, and did, provide and withdraw such coverage as they deemed appropriate, and tailor such coverage to fiscal constraints and the realities of public employment as they perceived them.

However, in the Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 697 ("1970 Amendments"), Congress for the first time added employee coverage requirements to the list of conditions for Federal approval of State unemployment compensation laws. The 1970 Amendments require the States to extend unemployment compensation coverage to public sector employees in State hospitals and institutions of higher education, and to give local governments the option of covering their own employees in-

stitutions run by them.

Moreover, Federal law requires regulatory provisions unrelated to benefit coverage; 26 U.S.C. §3304 (a) (5), the "labor standards clauses" discourage State and local government from maintaining policies which traditionally are regulated in labor-management relations statutes. State and local governments remain-on constitutional grounds-exempt from the National Labor Relations Act, 29, U.S.C. §151 et seq.

Now the 1976 Amendments require, with very limited exceptions, that all State and local government employees be covered by unemployment compensation and that their government employers finance the coverage by paying a State-law tax in the same manner as employers in private business and industry. 8/

8/ The only option given public sector employers is to reimburse for benefits actually paid rather than to pay a tax in anticipation of benefit payments. 26 U.S.C. §3309 (a) (2).

3. Sanction on Private Sector Employers to Enforce Public Sector Compliance

The failure of a State to amend its unemployment compensation law to provide the State and local government employee coverage required for conformance with the 1976 Federal Amendments results in "decertification" of the State's entire unemployment compensation program, public and private, and in the imposition of a 2.7% FUTA tax penalty (the loss of the FUTA tax credit) on the State's private sector employers. 26 U.S.C. §3304 (c). These private sector employers thus have to pay FUTA taxes at a rate five time grater than that imposed on private sector employers in conforming States (a FUTA tax increase from 0.7% to 3.4%). None of these FUTA tax revenues and penalties can be used in support of the nonconforming State's existing private sector unemployment compensation program. Thus, the entire private sector Federal payments - not merely the penalty - are to be diverted from New Hampshire to be used as the Secretary

of Labor desires in other States. The imposition of the FUTA tax penalty on the State's private sector employers is retroactive to the beginning of the applicable year, here 1978. The amount of this annual tax penalty on New Hampshire's private sector employers is conservatively estimated to be $40 million. 9/

C. COVERAGE OF STATE AND LOCAL GOVERNMENT EMPLOYEES UNDER EXISTING NEW HAMPSHIRE LAW IS RATIONAL AND COST-EFFECTIVE

Since 1957, the State of New Hampshire has provided full unemployment insurance coverage of its staff of permanent classified employees in its civil service; State employees not covered include temporary and seasonal workers, as well as those not in classified service. 10/

9/ This was not disputed on the administrative record below.

10/ "Temporary" positions are those "known to be of limited duration," while "seasonal" positions are those as to which the need "may be reasonable anticipated as likely to recur each year for a varying period of time." RSA §282.1(H) (4) (r).

New Hampshire's existing program of unemployment for State and local government employees is clearly rational and cost-effective. The program has not failed to meet the legitimate needs and expectations of such employees. Yet this program for State and local government - as well as the entirely independent program for private sector employees - is now threatened with extinction by USDOL's insistence that NHUCL does not satisfy the 1976 Amendments' requirements for full unemployment coverage and financing of unemployment benefits for State and local government employees.

D. THE RULING BELOW

The Court of Appeals for the First Circuit, after briefing and oral argument, entered its order and opinion on February 20, 1980, affirming the Order of the Secretary of Labor. This appeal follows.

THE QUESTIONS ARE SUBSTANTIAL

The issues raised by this appeal are substantial, and, in the main, are matters of first impression (Appendix, Opinion Below, Note 1, at p. 2). As with most cases in which state or federal laws of broad application are involved, the disposition of issues here presented determine the placement of financial and other burdens of great magnitude, and affect policy making functions in both business and government.

That much is true in New Hampshire alone, the source of this issue; necessarily, however, the same considerations have both application and substantial consequences in every state in the nation, since the federal law challenged is at

once national in scope and coercive of uniformity among state laws.

Considering the financial consequences of conformity, New Hampshire may be expected to present one of the smaller examples of the financial impact of the 1976 Amendments to the FUTA. The impact of non-conformity and loss of the 90% FUTA credit now available to private sector employers is another matter entirely, and involved, conservatively, $40 million in New Hampshire alone in 1978. The amount of money involved nationwide is necessarily staggering, and the identity of the classes or groups of persons or organizations bearing the financial burden of the 1976 Amendments varies dramatically according to the resolution of the issues raised herein.

THE PRINCIPLE INVOLVED

The consequences of a resolution of this case, whatever the outcome, reach far beyond the perimeter of New Hampshire as a locale, and of

unemployment relief programs generally. The principle at stake in this case is whether, or to what extent, the federal government can lawfully affect and control the internal governance, functions, and finances of state and local governments, by indirection, where the same effects and controls applied directly would be unconstitutional and void.

In the circumstances of this case, the question is thus posed, whether the federal taxing power may be used by Congress in the fashion approved with respect to unemployment programs in the private sector by this Court in Steward Machine Co. v. Davis, 301 U.S. 548 (1937), to accomplish (Appellants say "coerce") a result which is not within its power to compel directly upon a state government under this Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976).

Just as Appellants here seek sincerely to convince this Court of the substantial import of

the issues presented (although New Hampshire may present a relatively samll instance of financial impact compared to a state such as New York or California), so, too, they urge that this Court appreciate what this case is not.

This case is not Steward Machine revisited. That case was, at bottom, a tax refund case, and the Court's focus was whether the tax levied, being rational and uniform on its face, became arbitrary and unconstitutional on account of its being linked to a national unemployment relief program held to be within the scope of congressional power as applied to the private sector of business and employment relationships.

This case, however, starts with the proposition that Congress may not control by direct legislation the employment terms and conditions of state and local governments under the holding in National League, and asserts that, if that holding is to have any lasting consequence to matters of state sovereignty and principles of

federalism, the proposition must also be established that Congress cannot compel, by threat of adverse tax consequences to unrelated (read: innocent) parties geographically classified by the boundaries of the state (or other jurisdiction) to be affected, that very same degree of regulation and usurpation of discretion prohibited to it when acting ex cathedra.

FREEDOM OF CHOICE

The standard defense to the position asserted by Appellants in this case is that the State is free to choose its course, and is not compelled, but only invited, to do the bidding of Congress. Steward Machine, id. Such would be the case if:

(1) State and local governments were a permissible object of federal regulation of employment practices; and

(2) State and local governments were taxpayers from whose tax burden the 90% credit could be granted to maintain the parity of burden present in the private sector system.

Instead, here, the contrary is true in both respects, the result being that, if the State conforms with the federal dictate, a direct and uncompensated charge upon the public fisc necessarily follows, contrary to the considered choice of the state absent the federal

mandate; if the state does not conform, the private sector business community, which already pays for its charges upon the unemployment compensation system, now pays a dramatically increased federal tax, solely as a consequence of the state's resisting an "invitation" to do what it does not wish, and cannot be compelled, to do. Either consequence, Appellants submit, is constitutionally fatal to the federal provisions creating such a "Hobson's choice".

The Steward Machine opinion did not decide the case now presented by this appeal, and, more precisely, reserved consideration of such issues to a more appropriate controversy.

"In ruling as we do, we leave many questions open. We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. No such

question is before us. In the tender of this credit Congress does not intrude upon fields foreign to its function."

Steward Machine Co. v. Davis
Id. at 590

Indeed, Mr. Justice Cardozo's opinion infers that the imposition of "a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national", is defective on that account. Id., at 591. This case is not a matter where "the tax and the alternative (are) approximate equivalents".

TAX OR CREDIT UPON THE TAX

A further development in the law germane to this case serves to reinforce the position of Appellants here. The Steward Machine suggests that a tax, once laid on with geographical uniformity, does not become infirm because a credit upon it may be conditioned to have effect,

or to lose its effect, in a particular geographical location, ie., a state. Appellants submit, with some keenness of feeling, that that proposition, if ever viable, did not survive the holding of this Court in Austin v. New Hampshire, 420 U.S. 656 (1975). There, a tax uniformly laid, but with credits based upon geographical determinants, was held defective. That case established the principle that the practical impact, not the pristine technical features, of a tax are the measure of its basis for constitutional scrutiny. Here, should the operation of the federal provisions challenged go so far as to alter the credit status under the FUTA of New Hampshire residents alone, then such necessarily non-uniform taxation will have been established solely upon what Congress cannot compel directly. That, by any previous analysis of which Appellants are aware, is not a rational basis to sustain a tax measure which is, or on such occasion becomes, non-uniform and

discriminatory..

Austin v. New Hampshire
supra

THE ADMINISTRATIVE AND JUDICIAL REVIEW

Appellants call the Court's attention to the provisions of 26 U.S.C. §3304 (c) and §3310. The federal provisions call only for notice and opportunity for hearing when a state's laws are to be challenged by the Secretary of Labor. Yet the procedure applied is not the conventional administrative review in which the case arises from the lowest ranks of the agency and proceeds up through a conventional review procedure, and ultimately to the judicial system.

Here, the Secretary of Labor is the plaintiff, and has at the outset made a determination of non-conformity when a Notice of Hearing is published. Since the Administrative Law Judge (however impartial) has authority only to recommend a decision, and the final determination is made by the

same Secretary of Labor who commenced the proceeding, to expect the outcome to be otherwise than the beginning is unrealistic in the extreme. The process itself brings the accused before a bench occupied, in the end, by the accuser, and is, on that account alone, barren of fundamental due process and unconstitutional.

CONCLUSION

For the reasons set forth above, Appellants respectfully urge that this Court note probable jurisdiction of this appeal, so that the issues raised herein may have the thorough briefing and plenary consideration which Appellants sincerely believe that the deserve.

Respectfully submitted,

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May 20, 1980

UNITED STATES DISTRICT COURT FOR THE COURT OF APPEALS FOR THE FIRST CIRCUIT

THE STATE OF NEW HAMPSHIRE, DEPARTMENT OF EMPLOYMENT SECURITY, AND THE STATE OF NEW HAMPSHIRE,
Appellants

v.

Civil Action No. 78-1564

THE HONORABLE E. RAY MARSHALL, SECRETARY OF LABOR OF THE UNITED STATES; AND THE UNITED STATES DEPARTMENT OF LABOR,
Appellees

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The State of New Hampshire, Department of Employment Security; and The State of New Hampshire, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on February 20, 1980.

This appeal is taken pursuant to 28 U.S.C. §1254.

The State of New Hampshire
Gregory H. Smith, Acting Attorney General, By
James E. Morris,
Assistant Attorney General

/s/ James E. Morris

The State of New Hampshire, Department of Employment Security
Edward F. Smith
General Counsel

/s/ Edward F. Smith

Concord, New Hampshire
May 20, 1980

I certify that a copy of the foregoing was sent by first-class, postage paid mail to the following:

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